



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 20, 1995

Mr. Leonard W. Peck, Jr.  
Assistant General Counsel  
Legal Affairs Division  
Texas Department of Criminal Justice  
P.O. Box 99  
Huntsville, Texas 77342-0099

OR95-072

Dear Mr. Peck:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27796.

The Texas Department of Criminal Justice ("TDCJ") received several requests for information from a former employee. The requestor seeks information relating to his termination, the investigation of a complaint he filed against TDCJ, and an employment hearing. You submitted "exemplars" of records responsive to those requests to this office for review.<sup>1</sup>

You contend that the information requested is excepted from disclosure under section 552.103(a).<sup>2</sup> To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d

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<sup>1</sup>You submitted "exemplars" to this office in response to the requestor's July 7 and July 28, 1994 requests for information about his termination, hearing, and complaints. The requestor sent a third request, dated September 1, seeking a copy of a "final report" concerning his case, and a list of witnesses interviewed for that report. Since you apparently submitted no other documents in response to that request we assume that the third request was duplicative of the first two requests and that the submitted documents are responsive to all three requests for information.

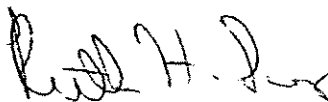
<sup>2</sup>You indicate that some of the records submitted to this office are work product. We note that you timely raised section 552.103(a) and attorney work product comes within that exception. Open Records Decision No. 575 (1990). *See also* Open Records Decision No. 630 (1994) (the section 552.107(1) exception for attorney-client privilege is waived if not timely raised).

210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for damages and promises further legal action if such is not forthcoming. Open Records Decision No. 551. Litigation has also been found to be reasonably anticipated when a former employee has filed complaints alleging discrimination, then hired an attorney who informs the agency's legal counsel that he intends to file suit based on those complaints. Open Records Decision No. 555 (1990). On the other hand, an isolated threat of litigation, without more, does not constitute reasonably anticipated litigation. Open Records Decision No. 351 (1982) at 2. Even several public threats to file suit, without other steps being taken, do not show that litigation is reasonably anticipated. Open Records Decision No. 331.

From the information provided this office, it appears that the requestor complained to the TDCJ Equal Employment Opportunity officer that he had been discriminated against. An internal hearing concerning his termination also was held. You note that the requestor has an attorney who assisted him during these processes. You state that litigation is reasonably anticipated because the requestor "has been sparring for some time with the management of the Community Justice Assistance Division" and that various staff members "have been assured orally" that they have not seen the last of the requestor and his attorney. You do not indicate if the requestor, his attorney, or another party made these statements to staff members. No information was provided this office to show that the requestor's attorney has made any written or verbal threats to bring a lawsuit against TDCJ. Since TDCJ has not met its burden of showing the applicability of section 552.103(a), this information may not be withheld from disclosure pursuant to section 552.103(a).<sup>3</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

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<sup>3</sup>We note that a number of the records submitted to this office were written by the requestor, to the requestor, or were other documents he had access to or had seen. Even if litigation were reasonably anticipated, section 552.103(a) does not except from disclosure records that the opposing party has already seen or had access to, as in this situation. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350, at 3, 349, at 2 (1982).

RHS/KHG/rho

Ref.: ID# 27796

Enclosures: Submitted documents

cc: Mr. Frank Archuleta  
16905 Gower Street  
Pflugerville, Texas 78660  
(w/o enclosures)